

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1243

To be argued by
DANIEL J. KORNSTEIN

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

-against-

WILLIAM HOCKRIDGE, CHARLES PETRI and STEPHEN
EASTON,

Defendants-Appellants.

**BRIEF FOR DEFENDANT-APPELLANT
CHARLES PETRI**

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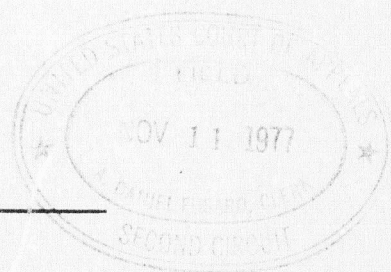


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
- against - :
WILLIAM H. HOCKRIDGE, CHARLES : Docket No. 77-1234
PETRI and STEPHEN K. EASTON, :
Defendants- :
Appellants :
-----X

BRIEF OF DEFENDANT-APPELLANT
CHARLES PETRI

This is an appeal by defendant-appellant Charles Petri from a judgment of the District Court for the Southern District of New York (Bonsal, D. J.) convicting him of conspiring to violate 18 U.S.C. §§656, 1005, 1014, of misapplying bank funds (18 U.S.C. §§656), and of making false statements (18 U.S.C. §1014).

Preliminary Statement

At stake on this appeal is the integrity of the guilt-determining process. This appeal requires this Court to decide whether evidence of jury bias and express repudiations by two jurors, prior to discharge, of a partial verdict, in a criminal case punctuated by jury misbehavior, sufficiently taints the entire process of determining guilt or innocence so as to mandate reversal of all convictions. Only reversal can ensure the fair performance of the vital functions of a federal criminal jury and public confidence in its result.

Jury bias came to light shortly after the trial started, when one juror told the trial judge:

(T)he people in the jury are not giving these people (defendants) a fair chance . . . several of the people have expressed their opinion that these people are guilty. (T.566)*

At that time seven other jurors and two alternates confirmed that they had heard other jurors express opinions as to the defendants' guilt. Another juror told the trial judge that she had heard three jurors "...make statements like, oh they are guilty, let's get this over with." (T.696)

Lack of unanimity arose later, after the jury had returned a partial verdict of guilty as to three

* References preceded by the designation "T." are to the transcript of the proceedings below.

defendants on the conspiracy count, but while the jury was still deliberating as to other counts. Two jurors then wrote notes, one saying:

Judge Bonsal, please see me as soon as possible this morning. I feel that I have committed a grave injustice. Inasmuch as I let myself be led or rushed for lack of a better word into agreeing with the verdict of the jury. I'm sorry for having let this matter continue as long as I have. (T.5920)

On being interviewed by the trial judge, the two jurors said that they no longer agreed with the verdict on the conspiracy count. They said they were "(r)ailroaded, you know, before we could bring up our doubts." (T.5930)

Despite these revelations, the trial judge refused to declare a mistrial, and Petri appeals from the guilty verdicts that resulted.

On this appeal, appellant Petri seeks reversal in order to obtain no more than the proper and impartial jury trial he should have had in the first place. Unless Petri's conviction is reversed, community confidence in the fair administration of criminal justice will be corroded.

Issues Presented*

1. Whether or not the failure of the District Court to take any effective remedial action after learning of jury prejudice denied Petri his right to a trial by an impartial jury?

2. Whether or not the failure of the District Court to set aside the partial verdict on the conspiracy count, after hearing--before the jury was discharged--two jurors say that the reported verdict on the conspiracy count was not their true verdict, denied Petri his right to a unanimous verdict based on proof beyond a reasonable doubt?

3. Whether or not any impropriety surrounding the partial verdict on the conspiracy count renders defective the guilty verdicts on substantive counts because the charge to the jury made conviction on substantive counts possibly conditional on a finding of conspiracy?

* To avoid presenting unnecessarily duplicative papers to the Court, Petri joins in those issues raised by other appellants insofar as they may be applicable to Petri. Fed.R.App.P. 28(i). Petri also adopts the appendix filed by appellant Easton.

Statement of the Case

Charles Petri is an indigent. Too poor to pay for a lawyer of his own choice, he has been represented at every stage of these proceedings by assigned counsel.*

This appeal is from Petri's conviction on one count of conspiring to violate federal banking laws, on one count of aiding and abetting the misapplication of bank funds, and on one count of aiding and abetting the making of false statements to federally insured banks. After a two and one-half month trial, Petri was convicted by a jury in February 1977. Judge Bonsal subsequently sentenced Petri to four years imprisonment on the conspiracy count and on the count relating to misapplication of bank funds and to two years imprisonment on the false statements count, each sentence to be served concurrently.

The Indictment

The indictment in this case, handed down on August 27, 1976, charged Petri and co-defendants William H. Hockridge, Stephen K. Easton, George Flynn and Charles Rapport with twenty-four (24) separate acts of wrongdoing that

* In September 1977, Petri was assigned counsel for this appeal pursuant to the Criminal Justice Act, 18 U.S.C. §3006A.

can usefully be divided into four main groups.

First is Count 1, which charges the defendants with conspiracy to violate 18 U.S.C. §§656, 1005 and 1014. Those statutes proscribe, respectively, willful misapplication of bank funds, the making of false statements to influence conduct by federally insured banks, and the making of false bank entries. In essence the indictment claimed that the other defendants conspired with Hockridge, a loan officer with Chemical Bank, in order to procure bank loans used by the defendants to turn around failing companies that the other defendants had taken over. Count 1 also contains allegations that the other defendants gave Hockridge money, paid his expenses on junkets and otherwise provided him with benefits.

The second count is a substantive charge that the defendants violated 18 U.S.C. §656, either as principals or as aiders and abettors, by willfully misapplying bank funds.

Counts 3 through 17 form the third group, which consists of substantive charges that the defendants, either as principals or as aiders and abettors, made 15 separate false statements in violation of 18 U.S.C. §1014.

The fourth group, made up of Counts 18 through 24, charges the defendants, as principals and as aiders and abettors, with substantive violations of 18 U.S.C. §1005 relating to the making of seven false bank entries.

Rapport was not named in Counts 18 through 24.

The Trial

Not all of the defendants charged by the indictment actually went through to the end of the trial. Before the trial began, Whitney pleaded guilty to the conspiracy count. One day before summations, the District Court severed Rapport due to an injury suffered by his attorney. The other defendants, including Petri, pleaded not guilty.

The trial started on December 2, 1976 and lasted until the third week of February 1977, until some 69 witnesses had taken the stand.

The "Modified Pinkerton" Charge

On February 11, 1977, Judge Bonsal charged the jury. To the extent that the charge is relevant here, it contained what is known as a "modified Pinkerton" charge:

One other word, ladies and gentlemen, regarding all of these substantive counts. The government is contending here and the defendants deny this, that all of the crimes listed in these substantive counts were really in furtherance of the conspiracy charged in Count 1.

I have asked you to consider Count 1 first. You remember when I reviewed the conspiracy count with you it charged among the purposes of a conspiracy was the misapplication of funds, making of false financial statements, making of false white sheets.

If you find in Count 1 that there was a conspiracy here, and if you find on the substantive count the person who did it--Hockridge, in this case, for instance, in the white sheets, or the person who filed a false statement,--was a member of the conspiracy, and if you have found that the defendant you are considering was also a member of the conspiracy,--and if you have found that the substantive count,--the misapplication of funds, the false statements, the white sheets--that these things were done in furtherance of that conspiracy, then you may find the defendant you are considering guilty under the substantive count. (T.5835-6)

A "modified Pinkerton" charge, such as was given here, may make conviction on the substantive counts contingent upon conviction on the conspiracy count. In effect, Judge Bonsal told the jury: if you find someone guilty of conspiracy, then you may find him guilty of a substantive count too. Thus if a guilty verdict on the conspiracy count is defective or open to question, then it follows from a "modified Pinkerton" charge that guilty verdicts on the substantive counts are automatically suspect.

Verdicts

The "modified Pinkerton" charge takes on significance because of the sequence in which the jury rendered its verdicts. After deliberating for a day and a half, the jury announced that it had reached a verdict as to three defendants on the conspiracy count. Despite objections by defense counsel, Judge Bonsal took the

partial verdict of guilt as to Petri, Hockridge and Easton. Although the jury was polled, a separate poll was not taken of each juror as to each of the three defendants.

Thereafter the jury found Petri, Hockridge and Easton guilty on the misapplication count, and Petri guilty of one false statement count (Count 8). As for Flynn, the jury acquitted him on 13 counts.

After the jury rendered its verdicts on 13 of the 24 counts, the District Court dismissed the remaining counts and discharged the jury.

Jury Misconduct

From start to finish the trial was marred by jury misconduct. Fortunately for all of us concerned with the integrity of the guilt-determining process, and the appearance of such integrity, evidence of such misconduct came to light prior to the discharge of the jury. Had such irregularities gone undetected until after the jury was discharged, this would be a difference case altogether. But the jury misconduct did become apparent early on, and the District Court had ample opportunity to fashion an appropriate remedy. The trouble is that no effective remedy was applied, and the integrity of the jury system -- as well as the particular defendants -- thereby suffered.

Jury Bias: "Oh They Are Guilty, Let's Get This Over With." The first incident of jury misbehavior occurred only five days after the trial began. After having received a note from Juror No. 3, the Court interviewed her alone in chambers, where she disclosed (a) that jury members had violated the Court's instructions about refraining from discussing the case, and (b) that jury members had already formed and manifested bias against the defendants.

As Juror No. 3 said to Judge Bonsal:

(T)he people in the jury are not giving these people (defendants) a fair chance . . . several of the people have expressed their opinion that these people are guilty. (T.566)

But Judge Bonsal treated this extraordinary revelation rather off-handedly, saying:

I don't think it is serious and I think this is the normal reaction of a young, perhaps little idealistic girl . . . ,
(T.570)

On learning of this exchange, the defendants moved for a mistrial, but Judge Bonsal denied the motion. (T.570)

Judge Bonsal did decide, however, to interview the other jurors at the end of the day's testimony, and those interviews bolster Juror No. 3's appraisal and make Judge Bonsal's comment about idealism ring hollow. The interviews showed that seven other jurors and two alternates had heard other jurors state opinions as to the guilt of

the defendants. According to Juror No. 4, "They make statements like, oh they are guilty, let's get this over with." (T.696) Defendants again moved for a mistrial and again Judge Bonsal denied the motion.

The only prophylactic measure take at this point by the District Judge was to remind each juror not to talk about the case before testimony was finished. (T.688-727)

Lack of Unanimity: "A Grave Injustice." At 6:30 P.M. on February 14, 1977, after deliberating for approximately a day and a half, the jury told the Court that a verdict had been reached regarding three defendants on the conspiracy count. Despite counsel's objection, Judge Bonsal heard the partial verdict finding Hockridge, Petri and Easton guilty. (T.5961-2) At defendants' request, the Court polled the jury, but each juror was not polled separately as to each of the three defendants.

During the morning of the very next day, Juror No.4 sent a note to Judge Bonsal, requesting to see him. Judge Bonsal failed to disclose receipt of Juror No. 4's note until 5:00 P.M. of the day it was received. Judge Bonsal, after consulting counsel, decided not to see Juror No. 4.

At 10:00 A.M. the next day, Judge Bonsal told counsel that he had received a second note -- this time from Juror No. 3. The note was startling, to say the least:

Judge Bonsal, please see me as soon as possible this morning. I feel that I have committed a grave injustice. Inasmuch as I let myself be led or rushed for lack of a better word into agreeing with the verdict of the jury. I'm sorry for having let this matter continue as long as I have. (T.5920-1) (emphasis added)

Judge Bonsal refused to set aside the partial verdict but then decided to interview Jurors No. 3 and No. 4, to "see (if he could find) any way of salvaging this thing." As for the verdict on the conspiracy count, Judge Bonsal said:

I am not going to let it stand if I am satisfied that this lady as she says it was pressured into doing it. Don't worry about that. (T. 5923)*

On being interviewed in chambers without counsel present, the two jurors said their comments were directed to the conspiracy verdict rendered against Hockridge, Petri and Easton (T.5928):

THE COURT: (After reading Juror No. 3's note aloud) Starting with that, I take it that's the verdict on the conspiracy count that came in the night before last.

JUROR NO. 3: Yes, sir.

THE COURT: As I recall it, the verdict found three of the defendants, Hockridge, Petri and Easton guilty.

JUROR NO. 3: Yes.

* One trial counsel noted that he "saw No. 3 coming in and crying Friday. On Monday, both No. 3 and No. 4 appeared as if they had been under a tremendous emotional pressure." (T. 5923)

THE COURT: Now, is your concern with all three of those?

JUROR NO. 3: Yes, it is. All three.

THE COURT: All three of them?

JUROR NO. 3: Yes.

THE COURT: What is your concern?

JUROR NO. 3: I felt that there was not enough evidence to make me decide that Mr. Hockridge and Mr. Petri were involved in a conspiracy.

Juror No. 4 indicated that during the deliberations she "was personally attacked incredibly by two members (of the jury)." (T.5929) The Court refused to permit her to describe the nature of the attack. (T.5930)

Juror No. 4 pointed out that she and several other jurors were:

...railroaded, you know, before we could bring up our doubts . . . I know that at the time when we were polled that I should have said no. (T.5930)

The Court then turned to Juror No. 3 and stated to her:

(Y)ou have had sort of an emotional problem with this thing here, haven't you?

JUROR NO. 3: It can be an emotional problem but the question in my mind is the reasonable doubt . . . (instruction as to reasonable doubt omitted)

THE COURT: I think what I would like to do is this. You know, I mentioned to you when I charged you I don't want you ever to surrender your honest convictions because of other jurors.

JUROR NO. 3: That is what I did.

THE COURT: You think you did.

JUROR NO. 3: I feel that I did. I surrendered myself because of verbal attack. (T.4931-2)

Judge Bonsal finally said to the two jurors:

I would like you to think about that (the conspiracy verdict) and resume your deliberations and then we'll see how it goes today with the deliberations and then perhaps after we finish here I will want to see you again.

JUROR NO. 3: I don't understand what you mean. Continue the deliberating --

THE COURT: After the jury finishes, I think I will want to see you again and talk again about some of these things that you have told me this morning. But I think it would be wise if both of you could go back with the jurors.

You have got a problem and you do the same thing with respect to Mr. Easton. Think that one over pretty carefully and you have a problem with, I take it, all three of them.

JUROR NO. 3: All three of them, yes.

It then became known that at least one other juror had repudiated the partial verdict:

JUROR NO. 4: I know there is one other member who feels that way too.

THE COURT: About what?

JUROR NO. 4: I think about all three actually. But I think specifically about Easton also.

THE COURT: All right. Why don't you go back then and let's see where we go today and I'll follow this up

One other thought. When you go back with the jury and when you think it is an appropriate time, you raise your points again with the jury about what you think about what they have done and see what they think about that and have an exchange about that. (T.5934)

Defendant Petri subsequently moved for a mistrial (T.5935), but Judge Bonsal denied the motion, saying he was "satisfied that neither of the two jurors surrendered their honest convictions." (Decision dated April 12, 1977)

After his meeting with Jurors No. 3 and No. 4, Judge Bonsal never charged the jury as a whole to deliberate anew on the conspiracy count. Nor did Judge Bonsal inform the jury as a whole of the substance of the interviews. He never met again with Jurors No. 3 and No. 4, despite his promise to do so. He did not repoll the jury as to the conspiracy count. He did not permit Juror No. 3 and No. 4 and at least one other juror to alter their verdicts on the conspiracy count.

* * *

It is this jury misconduct that Petri believes so infected his trial as to require reversal.

Summary of Argument

The District Court failed to do anything meaningful to correct jury bias and the partial verdict on the conspiracy count that two jurors, before being discharged, told the Court was not their true verdict. This failure requires reversal of Petri's conviction for several reasons.

The fundamental right of jury trial in federal criminal cases requires impartiality, unanimity, proof beyond a reasonable doubt, and integrity in the guilt-determining process. All of these requirements went unmet here. Evidence of prejudice polluted the jury deliberations. That two jurors disavowed the partial verdict prior to the jury's being discharged means that the partial verdict was not unanimous. Since the verdict was not unanimous, there was a reasonable doubt as to Petri's guilt. These procedural defects raise haunting doubts about the accuracy and integrity of the process of determining guilt or innocence.

Inasmuch as the dissenting jurors notified the trial judge before being discharged, there is no question but that their action was timely. Fed.R.Evid. 606(b), which deals with the competency of jurors as witnesses, is irrelevant because the events occurred during deliberations.

The trial court erred by letting the partial verdict stand. Either a mistrial should have been declared

or the jury as a whole instructed to continue deliberations as to the conspiracy count. The District Court followed neither course.

The errors regarding the verdict on the conspiracy infected the verdicts on the substantive counts because of the jury charge which made substantive convictions possibly contingent on a finding of conspiracy.

Argument

POINT I

PETRI, WHO WAS CONVICTED BY A BIASED AND
DIVIDED JURY, WAS DENIED HIS RIGHT TO AN
IMPARTIAL AND UNANIMOUS JURY VERDICT ON
THE BASIS OF PROOF BEYOND A REASONABLE
DOUBT

We start from certain indisputable premises:

-- A jury trial is a basic and hallowed right of a defendant in serious criminal cases, the proud boast of a free society, embodying a deep national commitment as a defense against arbitrary law enforcement. As the Supreme Court said in Duncan v. Louisiana, 391 U.S. 145, 156 (1968):

The guarantees of jury trial in the Federal and State Constitution reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision

about the exercise of official power— a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

-- A jury trial must be impartial. The Sixth Amendment itself requires no less: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...." To ensure an unbiased jury, the Constitution requires the availability of a change of venue, e.g., Gropi v. Wisconsin, 400 U.S. 505 (1971); protection from inflammatory press coverage and ex parte influence by court officers, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Gold v. United States, 352 U.S. 985 (1957); that certain information must not go to the jury no matter how strong a cautionary charge accompanies it, e.g., Bruton v. United States, 391 U.S. 123 (1968); that no person can be convicted by a jury from which members of an identifiable group to which he belongs have been systematically excluded. E.g., Hernandez v. Texas, 347 U.S. 475 (1954).

-- A jury verdict in a federal criminal case must be unanimous. In an unbroken line of cases reaching back into the late 1800's, the Justices of the Supreme Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of a federal jury trial.

Andres v. United States, 333 U.S. 740, 748-9 (1948);
Patton v. United States, 281 U.S. 276 (1930). Not only
is unanimity required by case law and tradition, it
is also required by Fed.R.Crim.P. 31(a)* and probably by
the Sixth Amendment. See Apodaca v. Oregon, 406 U.S. 356,
371 (1972) (Powell, J., concurring).

-- A verdict of guilt must be based upon proof
beyond a reasonable doubt. In re Winship, 397 U.S. 358,
363-4 (1970). This requirement stems from the Due Process
Clause. Id. Related to the requirement of proof beyond
a reasonable doubt is the bedrock presumption of innocence,
with which all criminal defendants are cloaked.

-- Our judicial system has traditionally been
concerned with the integrity of the procedures used to
ascertain the truth at a criminal trial. It is essential
that the guilt-determining process be scrupulously free
from and above even the appearance or taint of impropriety.
Cf. People v. DeJesus, —N.Y.2d— (Oct. 18, 1977) ("...the
bench must be scrupulously free from and above even the
appearance or taint of partiality.") The determination
of guilt or innocence at trial is of such fundamental
importance that new constitutional rules are applied

* Fed.R.Crim.P. 31(a) provides that: "The verdict shall
be unanimous."

retroactively when they affect the integrity of the truth-determining process. See generally United States v. United States Coin and Currency, 401 U.S. 715 (1971); Williams v. United States, 401 U.S. 646 (1971); Desist v. United States, 394 U.S. 244 (1969); Stovall v. Denno, 388 U.S. 293, 298 (1967); Johnson v. New Jersey, 384 U.S. 719, 729 (1966).

From these premises, we can examine the record on this appeal to see if any of Petri's jury rights were denied.

A. Bias.

The record reveals that the jury that convicted Petri was prejudiced against him almost from the start. One juror told the trial judge after only five days of trial that:

(T)he people in the jury are not giving these people (defendants) a fair chance...several of the people have expressed their opinion that these people are guilty. (T.566)

Another juror said three jurors had made "statements like, oh they are guilty, let's get this over with." (T.696)

Faced with such evident bias before to the end of testimony, the trial judge merely said:

I don't think this is serious and I think this is the normal reaction of young, perhaps little idealistic girl... (T.570)

But we think it was serious and that idealism has a right-

ful place in the jury room. Jurors have no business pre-judging defendants, lest the hard-won right to a jury trial become a sham, a promise to the ear, broken to the hope.

As soon as Judge Bonsal learned of the jury misbehavior, he should have declared a mistrial. For it is settled, of course, that "the determination of whether a man is innocent or guilty (cannot be entrusted) to a tribunal 'organized to convict.'" Witherspoon v. Illinois, 391 U.S. 510, 521 (1968), quoting Fay v. New York, 332 U.S. 261, 294 (1947). Once jury prejudice surfaced, the jury became "organized to convict." If the District Judge had declared a mistrial then and there--only five days into the trial--the interests of judicial economy would have been served along with the protection of defendants' precious procedural rights.

B. Lack of Unanimity

As the record discloses, there was no unanimous verdict convicting Petri on the conspiracy count. A tentative partial verdict on that count was returned and shortly thereafter repudiated by two jurors, in the midst of further deliberations, before any other verdicts were announced and long before the jury was discharged. Those two jurors told the Court that their previously announced verdicts on the conspiracy count were not their true verdicts, and that they had committed a grave error

because they and one other juror did not think there was sufficient evidence for conviction but had wrongly surrendered their firm beliefs to the other jurors. See pp. 11-14 supra.

Such a situation immediately calls to mind the hoary shibboleth, generally attributed to Lord Mansfield, about a juror not being allowed to impeach his own verdict. See Vaise v. Delaval, 1 T.R. 11 (Eng. 1785). But the old maxim, now referred to by eminent commentators as an "absurdity," J. Maguire, J. Weinstein, J. Chadbourn and J. Mansfield, Cases and Materials on Evidence 887 (5th ed. 1965), and a "gross oversimplification," Advisory Committee's Note to Fed.R.Evid. 606(b), really has no application here for several reasons.

Timing of the Repudiation. Of greatest significance is the fact that the two jurors informed Judge Bonsal of the facts before the jury as a whole was discharged, before the jury had finished deliberating on the case as a whole, and even before the jury had returned a verdict on any other counts. Thus this situation contrasts sharply with cases in which jurors seek to change their minds after being discharged. Compare United States v. Chereton, 309 F.2d 197, 200 (6th Cir. 1962), cert.denied, 372 U.S. 936 (1963) (too late for jurors to change thie minds after being discharged). Discharge is the crucial divide. In the leading treatise on the law of evidence, Dean Wigmore, after stating the general rule that jurors' motives, beliefs, misunderstand-

ings, intentions and the like are immaterial, points out:

The reasons for the foregoing rule, namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is made by the judge and take place before the jurors' discharge and separation.

8 J. Wigmore, Evidence §2350 (McNaughton rev. 1961) (emphasis in original). See also 3 Weinstein's Evidence §606(04) (1975); 6A Moore's Federal Practice §59.08(4) at 59-143; ABA Standards Relating to Trial By Jury, Commentary to §5.7 at 137 (Approved Draft 1968). Precisely such investigation was made here by the judge prior to discharge, yet the trial judge took no effective remedial action.

Inasmuch as the repudiation occurred prior to discharge, Fed.R.Evid. 606(b) is for the most part irrelevant here. Rule 606(b) provides:

Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection herewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what (which) he would be precluded from testifying be received for these purposes.

On this appeal we are not dealing with the competency of jurors as witnesses; no one--other than the trial judge during deliberations--spoke to or interviewed the jurors, so far as we know. Rule 606(b) and the policy considerations embodied in it (particularly finality and repose) are not threatened by pre-discharge inquiries and remedies, especially where sought by the jurors themselves. If anything, Rule 606(b) shows that prior to discharge the trial court can and should do something to prevent a miscarriage of justice.

Partial Verdicts As Tentative, Working

Hypotheses. The timing of the disclosures in this case highlights the problems with partial verdicts. The Federal Rules of Criminal Procedure make no provision for such partial verdicts. Nor had the jury in this case announced that it was deadlocked when Judge Bonsal sought the partial verdict. Why then should the Court take a partial verdict when it is quite possible--even likely--that further deliberation on the other counts might have had an effect on jurors' views of the verdict to be rendered partially?

Partial verdicts, if they are to be allowed at all, must be considered in the nature of tentative, working hypotheses subject to change prior to the jury's discharge.

This rule is the only way to take account of decision-making problems by a jury. Any other rule may well freeze a jury prematurely into a partial verdict that the subsequent course of deliberations reveals as unwise. Thus a partial verdict, like the one here, should be likened to only an early estimate of guilt or innocence, an estimate probably made by any jury:

In deciding a disputed proposition, a rational factfinder probably begins with some initial, a priori estimate of the likelihood of the proposition's truth, then updates his prior estimate in light of discoverable evidence bearing on that proposition, and arrives finally at a modified assessment of the proposition's likely truth in light of whatever evidence he has considered. When many items of evidence are involved, each has the effect of adjusting, in greater or lesser degree, the factfinder's evaluation of the probability that the proposition before him is true.

Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process," 84 Harv. L. Rev. 1329 (1971). It makes common sense and is in accord with experience that tentative, working hypotheses, particularly in deliberative decision-making groups, often undergo change as more investigation, more light and more discussion take place.

For example, surely the members of this Court are aware of cases where they or other judges have formed initial positions following oral argument only to change their positions after more reflection or after reading draft opinions for the majority and the dissent. The tentative decision made by appellate judges in conference following oral argument resembles a partial verdict, and that decision is subject to change prior to when the formal written decision is actually published. The same reality applies to jury verdicts. If partial verdicts are permissible, they must be regarded only as assumptions adopted to permit or facilitate further deliberations, assumptions that are not immutable until the jury is discharged.*

Research has disclosed no case directly on point, a fact which itself underscores the rarity of the situation presented here. This Court's decision in Grace

* Polling the jury, as was done in this case, should not be the cut-off point. In the first place, each juror was not polled separately as to each individual defendant. Secondly, and more importantly, polling is designed to be a guide to understanding the verdict, not a wooden, mechanical, rigid moment of timing.

Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971), implies, however, that the trial judge here was right to interview Jurors No. 3 and No. 4, that he should have taken strong remedial action and that the failure to take such action is an appropriate subject on appeal.

In Grace Lines, Inc. v. Motley, the trial judge promptly declared a mistrial in a civil case when one of the jurors while being polled said, on being asked if the verdict was her's, "Yes, it had to be unanimous." Id. at 1030. This Court reversed on a petition for a writ of mandamus after considering the juror's explanation. Said this Court (Id. at 1031):

Her explanation makes it clear that during the jury's deliberation she had taken a contrary view but had won no one over to her position and in the interests of achieving a verdict she had made the vote of the jurors unanimous for the defendant.

Grace therefore stands for the proposition that the motivations of a juror who appears to disagree with a verdict are a proper subject of inquiry prior to discharge.

Grace also adumbrates what motivations would call for remedial action. After discussing the juror's explanation, the Court in Grace said (Id. at 1031-2):

There was no hint of coercion or improper conduct on her part or on the part of any other member of the jury....

While it may be argued that Juror No. 11's explanation implied a disagreement with the verdict, there is not sufficient (sic) in the record to warrant this conclusion.... There is nothing to indicate that she was surrendering a conscientious conviction.

Thus, had there been coercion or improper conduct or had she surrendered a conscientious conviction, then Grace implies that the trial judge would have been justified and even required to do something about it.

In sharp contrast with the facts in Grace, here the record shows both improper jury conduct and the surrendering of conscientious convictions. The revelations of jury bias barely five days after trial began, see pp.10-11 supra, constitute misconduct, as were the "incredible personal attacks" by other jurors. See p.13 supra. Similarly, the interviews with Jurors No. 3 and No. 4 show that they indeed had surrendered conscientious convictions, as the following exchange indicates (T.5928, 5931-2):

JUROR NO. 3: I felt that there was not enough evidence to make me decide that Mr. Hockridge and Mr. Petri were involved in a conspiracy.

* * *

THE COURT: ...You know, I mentioned to you when I charged you I don't want you ever to surrender your honest convictions because of other jurors.

JUROR NO. 3: That is what I did.

THE COURT: You think you did.

JUROR NO. 3: I feel that I did. I surrendered myself because of verbal attack.

And Juror No. 4 said she and other jurors had been
(T.5930):

...railroaded, you know, before we
could bring up our doubts.... I know
that at the time when we were polled
that I should have said no.

These facts, which came to light spontaneously, without suggestion or interference by defendants or their counsel, long, long before the jury was discharged are more than enough for corrective action. United States v. Grieco, 261 F.2d 414, 415 (2d Cir. 1958), cert. denied, 359 U.S. 907 (1959) (acknowledging that abusive conduct by jurors against a recalcitrant dissenter can upset a verdict); Kingsport Utilities, Inc. v. Lamson, 257 F.2d 553, 559 (6th Cir. 1958) (verdict invalid where some jurors surrendered honest convictions); United States v. Pleva, 66 F.2d 529 (2d Cir. 1933) (verdict reversed because juror, after being polled, said he had assented because he was physically unable to hold out).

In view of the facts in the record, there was no unanimity in the verdict on the conspiracy count.

C. Reasonable Doubt

In order to give substance to the reasonable doubt standard which the Government, by virtue of the Due Process Clause of the Fifth Amendment, must satisfy in federal criminal cases, see In re Winship, 397 U.S. 358 (1970), that clause must be construed to require a unanimous verdict in all federal criminal cases. Guilt cannot be

be said to have been proved beyond a reasonable doubt when one or more jurors at the conclusion of deliberation still possess such a doubt.

The interview with Jurors No. 3 and No. 4 showed that such doubt existed, and that therefore the partial verdict was not a true unanimous verdict.

D. The Trial Judge's Battery of Remedies

Once alerted to the problems relating to the propriety of the partial verdict, Judge Bonsal had several options open to him. The one he chose was merely to tell Jurors No. 3 and No. 4 to go back to the jury room and think about what had happened. This "remedy" was inadequate.

At one point Judge Bonsal considered setting aside the partial verdict. (T.5923) Such a course of action would have been appropriate. But the trial judge abandoned that course.

What the Court should have done was set aside the partial verdict, speak to the jury as a whole, and send the entire jury back for further deliberations. Wigmore says what a judge should do in this situation:

When therefore the jury brings in its verdict, the judge, in his just and usual control of the proceedings, may refuse to accept it as final and may require the jury to retire again to make the verdict more specific or more clear.

8 J. Wigmore, Evidence §2350 at pp. 691-2 (McNaughton rev. 1961) (emphasis in original).

As this Court said in Grace, the jury should have been sent back "under suitable instructions for further deliberating." 439 F.2d at 1032. Accord United States v. Fox, 488 F.2d 1093 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974); United States v. Sexton, 456 F.2d 961 (5th Cir. 1972); United States v. Bendicks, 449 F.2d 313 (5th Cir. 1971); Cook v. United States, 379 F.2d 996 (5th Cir. 1967); Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224 (D.C. Cir. 1946); Fed. R. Crim. P. 31(d).

As a last resort, the District Court could have declared a mistrial. The previous evidence of jury bias and the later evidence of non-unanimity would have supplied a sufficient predicate for such action.

Any of the suggested options would have been preferable to the course actually chosen by the District Judge, which was inadequate in this situation. Community confidence in the administration of justice cannot but be corroded under a system in which a verdict such as was rendered here is allowed to stand. The procedural safeguards surrounding a jury trial assure both a fair criminal trial and public confidence in its result. The District Court's conduct in this case undermines those basic assurances and impugns the integrity of the guilt-determining process.

POINT II

PETRI'S CONVICTIONS ON THE SUBSTANTIVE COUNTS
SHOULD ALSO BE REVERSED BECAUSE OF THE CHARGE
TO THE JURY MAKING CONSPIRACY A PREDICATE FOR
CONVICTION ON SUBSTANTIVE COUNTS

Employing a "modified Pinkerton charge," the District Judge instructed the jury that if it finds a conspiracy, it may find the defendants guilty of the substantive counts. See pp. 7-8 supra. Judge Bonsal allowed for a possible interdependence between conviction on the conspiracy count and conviction on the substantive counts. Therefore, as a matter of logic, if Petri's conviction on the conspiracy count is improper and reversed, then his convictions on the substantive counts should also be reversed. For there is no way to tell whether or not the jury used the conspiracy conviction as the basis for Petri's substantive convictions. We simply do not know.* The problem is made worse by the fact that the substantive counts of which Petri was convicted also constitute overt acts of the conspiracy as charged in the indictment.

In such circumstances, the only proper action for a reviewing court to take is to reverse the convictions on the substantive counts if it reverses the conviction on the conspiracy count. The situation here is different from an ordinary claim of inconsistency between the disposition of different counts. Compare United States v. Maybury,

* "How can anyone determine what went on in the mind of another or of twelve others who served as triers of fact?" R. Traynor, The Riddle of Harmless Error 23 (1970).

274 F.2d 899 (2d Cir. 1959) (inconsistencies between verdicts are ground for reversal in non-jury trials) with Dunn v. United States, 284 U.S. 390 (1932), and Steckler v. United States, 7 F.2d 59 (2d Cir. 1925) (inconsistencies held not ground for reversal in jury trials). Rather we find a situation in which the jury may well have proceeded on a wrong assumption -- i.e., that there was a conspiracy -- in order to find Petri guilty on the substantive counts.

The serious errors surrounding conviction on the conspiracy count require reversal of the convictions on the substantive counts unless the Government can show beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18 (1967). Whether an error qualifies as harmless depends on "whether there is a reasonable possibility that (it) might have contributed to the verdict." Id. at 23. See also Schneble v. Florida, 405 U.S. 427, 432 (1972) (no reversal "unless there is a reasonable possibility that the (error) contributed to the conviction"). Given the nature of the "modified Pinkerton charge," there is a "reasonable possibility" that the erroneous conspiracy conviction might have contributed to the verdict on the substantive counts.* Hence the error is not harmless, and the substantive convictions should be reversed.

* Judge Bonsal's charge created an interdependence between convictions on the substantive counts and conviction on the conspiracy count. See Kornstein, "A Bayesian Model of Harmless Error," 5 J. Legal Studies 121, 126-127 (1976).

POINT III

PETRI IS ENTITLED TO WHATEVER RELEVANT RELIEF
IS GIVEN TO THE CO-DEFENDANTS ON THEIR APPEALS

Petri adopts all the arguments on appeal made by the co-defendants insofar as they may benefit Petri. If the relief granted by the Court on those other arguments relates to Petri, then Petri should be awarded the same relief. This "principle is too well established and too manifestly good sense to need citation of the books." Debs v. United States, 249 U.S. 211, 214 (1919) (Holmes, J.).

If authority were called for, we need go no further than Fed.R.App.P. 28(i), which provides that, "(i)n cases involving more than one appellant or appellee... any appellant or appellee may adopt by reference any part of the brief of another."

Conclusion

For the reasons given, this Court should reverse the conviction of defendant-appellant Charles Petri.

Dated: New York, New York
November 11, 1977

Respectfully submitted,

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COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

WILLIAM HOCKRIDGE, CHARLES PETRI &
STEPHEN EASTON,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

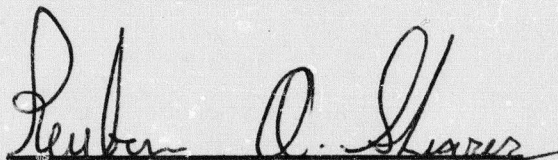
That on the 11 day of November, 19 77 at 1. 555 Madison Ave; NY. YNY
2. L 1 St Andrews Plaza; N.Y., N.Y.
3. 225 Broadway; N.Y., N.Y.
deponent served the annexed upon

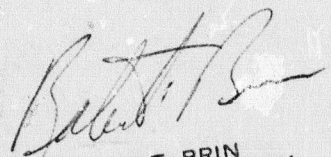
Brief

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

1. Lans Feinberg & Cohen, Esqs.
2. Robert Fiske
3. Irving Anolik, Esq

Sworn to before me, this 11
day of November, 19 77


Reuben A. Shearer


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979